

1
2
3
4
5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA,
8 Respondent,

9 -vs-

10 DANIEL ALLEN FLAHERTY,
11 Movant.

NO. CR-08-0137-WFN-29
CV-11-0332-WFN

ORDER

12 Before the Court is Mr. Flaherty's *pro se* 28 U.S.C. § 2255 Motion to Vacate, Set Aside
13 or Correct Sentence (ECF No. 2357). The Court issued an Order on December 14, 2011,
14 which permitted Defendant to amend his original § 2255 Motion and accepted Mr. Flaherty's
15 supplement briefing the statute of limitations issue. Mr. Flaherty filed a Memorandum of
16 Law on January 9, 2012, that further explained his position on the statute of limitation and
17 his § 2255 Motion.

18 **DISCUSSION**

19 Mr. Flaherty argues that the Supreme Court's decision in *Bond v. United States*, 131
20 S. Ct. 2355 (2011) created a newly recognized right permitting him to file a § 2255 Motion
21 attacking his underlying conviction and permitting filing of a § 2255 after expiration of
22 the one year statute of limitations. The Court disagrees. *Bond* did not create a newly
23 recognized right that would extend the statute of limitations as it had no effect on the
24 statute of conviction. Further, Mr. Flaherty did not plead facts sufficient to provide a
25 basis for equitable tolling. The Court has reviewed the file and the Motion and concludes
26 the Motion is untimely.

CERTIFICATE OF APPEALABILITY

An appeal of this Order may not be taken unless this Court or a Circuit Justice issues a certificate of appealability, finding that "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (West 2004). This requires a showing that "reasonable jurists would find the district Court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* A certificate of appealability should not be granted unless both components, one directed at the underlying constitutional claims, and the second directed at the court's procedural holding, are satisfied. *Id.*

Based on the Court's preceding analysis, the Court concludes that Mr. Flaherty has made a substantial showing of a denial of a constitutional right due to the lack of case law regarding the impact of *Bond*. Thus, a certificate of appealability should issue. Accordingly,

IT IS ORDERED that Mr. Flaherty's 28 U.S.C. § 2255 Motion to Vacate, Set Aside or Correct Sentence, filed December 5, 2012, **ECF No. 2357**, is **DENIED with prejudice**.

The District Court Executive is directed to:

- File this Order and provide copies to Mr. Flaherty and to the Government;
- Inform the Ninth Circuit Court of Appeals that if the Movant files a Notice of Appeal that a certificate of appealability is **GRANTED**; and
- **CLOSE** the corresponding civil file, **CV-11-0332-WFN**.

DATED this 24th day of May, 2012.

s/ Wm. Fremming Nielsen

 WM. FREMMING NIELSEN
 SENIOR UNITED STATES DISTRICT JUDGE

05-24-12